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No. 90-594

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NORTH BAY DEVELOPMENT DISABILITIES SERVICES, INC., D/B/A NORTH BAY REGIONAL CENTER,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S REPLY TO THE BOARD'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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Squarely presented here is the question not answered in *Beck*: whether the "legislative solution embodied in § 8(a)(3) allows employers" to collect dues equivalents from non-union workers under the NLRA in amounts "unrelated to collective bargaining expenses." *Communications Workers of America v. Beck*, 487 U.S. 735, 747, 758 (1988). In *Beck*, the Court ruled that "Congress understood § 8(a)(3) to...authorize the collection of only those fees necessary to finance collective bargaining activities." *Id.* at 759.

If under § 8(a)(3), unions are positioned to demand a bargaining agreement that requires non-member employees to pay more than a chargeable expenses fee to the union, then to insulate themselves from liability under § 8(a)(3), employers must be permitted to insist upon receiving information relating to the amount that the union seeks to charge those non-union employees. If not, then the employer has no defense to hybrid duty of fair representation employee lawsuits and charges of violating §

8(a)(3), an employer unfair labor practice. This interest is of maximum concern to employers covered by the Act.

The Board's Brief asserts that the "central issue" here is whether or not the amount of an agency fee is a non-mandatory subject of bargaining," NLRB Brief at 5 n.2. The Board incorrectly answers the question by arguing that the "amount of an agency fee concerns primarily the relationship between a union and non-member employees." This erroneous predicate leads the Board to conclude that the "amount" of the agency fee is not a mandatory subject of bargaining. Brief at 2. Petitioner, instead, submits that this issue is correctly resolved in two ways.

First, this Court has not *directly* answered whether the *amount* of the agency fee is comprised within the express language of Section 8(d) and whether that amount "wholly" involves an issue unrelated to mandatory collective bargaining requirements. However, petitioner believes that the Court's decisions in *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979), and *NLRB v. General Motors Corp.*, 373 U.S. 734 (1965), are dispositive.

Section 8(d) has never been interpreted by this Court as a *limitation* on the range of mandatory bargaining subjects. *Ford Motor Co.*, 441 U.S. at 495 (explaining that the original House bill was rejected in its attempt to "strait-jacket" and "limit narrowly the subject matters appropriate for collective bargaining"). Section 8(d), however, was enacted with the intent of not only mandating collective bargaining covering "wages, hours, and other terms and conditions of employment," but also "any question arising thereunder." The Board presents its opposition to the Petition by writing out this inclusive statutory language.

While suggesting that the underlying issue of agency fees, involves "the amount of money paid by employees to compensate the Union for its efforts in their behalf...has little, if anything, to do with the relationship between petitioner and its employees," the Board engages in linguistic acrobatics, because an employer is authorized under the Act to make any transfers of money to a

labor organization *only* from the "wages" of its workers. § 302, 29 U.S.C. § 186 (1947). See Pet. at 12. These transfers are made routinely through the payroll deduction of "dues." As *Ford Motor Co.* and *General Motors Corp.* directly and unequivocally imply, the union dues and agency fees nonmembers must pay as a condition of employment are a "term and condition of employment" and raise questions thereunder.[1]

There is no conundrum here. Since an employer must bargain over "terms and conditions of employment" under § 8(d), if under *Beck*, a union chooses to contract to take money directly from the *wages* of workers as agency fees (which in fact here include amounts beyond that authorized by § 8(a)(3) as incurred collective bargaining expenses), then some of this amount is "wages" wrongfully taken from non-members under *Beck*. *See Terry*, 110 S. Ct. at 1348. Therefore, an employer's negotiation of the *amount* of an agency shop fee directly implicates the "wages" and "terms and conditions of employment" provision under Section 8(d).

The Board's obfuscation of this fundamental point is best shown by its reading of *Ford Motor Co.*, where the Court ruled that in the circumstances of that case, bargaining over the price of in-plant cafeteria food was a bargainable issue. The Board, "order[ed] Ford to bargain on both food prices and services and to supply the Union with the relevant information requested." 441 U.S. at 493.

There, this Court found that the availability of food was "of deep concern to workers," but that "the company was not in the business of selling food." *Id.* at 498. Yet, the Court concluded that "the prices at which food is offered and other aspects of this service may reasonably be considered among those subjects about

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[1]The Board also does not dispute that this Court in *Teamsters, Local No. 391 v. Terry*, 110 S. Ct. 1339, 1348 (1990), concluded that the award an employee receives for a union's breach of the duty of fair representation is "wages and benefits."

which management and union must bargain." *Id.* Furthermore, "including within § 8(d) the prices of in-plant-supplied food and beverages would also serve the ends of the National Labor Relations Act." *Id.*

Taking the Board's own proposed test from the opening sentence of its Argument, the determinative question is whether an agency shop fee concerns primarily the relationship between a union and non-member employees. If that is the only test, in *Ford Motor Co.*, the determinative question would have been whether food prices concern primarily the relationship between the company and its vendor, not whether the existence of a cafeteria involves the relationship between the employees and the vendor/employer.[2]

As the Court recognized in *Ford Motor Co.*, 441 U.S. at 501, "'matters involving individuals outside the employment relationship...are not wholly excluded'" when "it vitally affects the "'terms and conditions' of their employment.'" *Quoting Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178, 179 (1971). The questions presented in this Petition plainly affect "matters" within the employment relationship. Since the questions also involve agency shop agreements, which the Board and this Court in *General Motors* have ruled are indeed a mandatory subject of bargaining, the dispute here involves "issues that settle an aspect of the relationship between employer and employees," *id.* at 178, and fit comfortably within the scope of § 8(d).[3]

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[2]The relative importance of the situation confronted in *Ford Motor Co.*, we suggest, is insubstantial when compared with the critical one found here.

[3]By also suggesting that the Board's position is reasonable in light of a policy to deny an employer the means to assert the interests of its workers, counsel for the Board engages in the same *post hoc* reasoning as the court below did. The Board never said in its Decision that North Bay attempted to represent worker interests and specifically accepted only one conclusion of the ALJ, *i.e.*, the amount of agency fees is a nonmandatory subject of bargaining. Pet. App. 9a n.1. The attempt to resurrect this dead issue is improper, *Metropolitan Life In-*

The fine line drawn by the Board between the "amount" of the agency shop fees found non-mandatory vis-a-vis North Bay and the "price" of cafeteria food found to be mandatory in *Ford Motor Co.* is insupportable. Again, the central question here is whether section 8(a)(3) prohibits the *employer's* collection of 100% of a voluntary member's dues from nonmembers. This issue is especially important where the employer knows that since "dues equivalents from nonmembers in any *amount*" is not permitted, *Beck*, 487 U.S. at 759, a union's bargaining demand for a dues equivalent agency fee simultaneous with a refusal to show that all its expenditures are chargeable collective bargaining costs, puts the employer on notice that the fee is illegitimate. In that case, as here, the inclusion of a dues equivalent agency fee exposes the employer to liability for fees actually received by the union. *See Kaiser Steel Corp.*, 211 N.L.R.B. 446, 451-52 (1974) (requirement of fair dealing imposed by the Board on both employer and union when applying union security contracts).[4] The importance of this issue to employers, unions, and employees underscores the need for this Court's review.

2. The Board's position that the amount of the agency fee is an internal union matter outside of an employer's § 8(a)(3) reach, misconstrues this Court's decision in *NLRB v. General Motors*,

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surance Co. v. NLRB, 380 U.S. 438 (1965), and is not substantiated in this record.

[4]As emphasized in the brief of amicus curiae Karen Leslie Fuller, North Bay has been required to collect agency shop fees "equal to the Union's periodic dues and initiation fees to the Union." Brief at 13 n. 41; *In re Service Employees Int'l Union & North Bay Regional Center*, AAA Case No. 74-30-0010-87 (1987). In *Beck*, 487 U.S. at 759 (emphasis added), the Court stated that Congress did not leave "unions free to exact dues equivalents from nonmembers in any amount *they please*, no matter how unrelated those fees may be to collective bargaining activities." With the approval of the court of appeals, the Board's Decision below reverses the Court's explicit ruling in *Beck* by rewriting § 8(a)(3) to permit unions to demand the collection of agency fees in "any *amount* they please." This authorization is contrary to the Court's above stated *ultra vires* prohibition against unrestricted union authority to do precisely that.

373 U.S. 734 (1963), and ignores the way nonmembers' fees are collected. At bar, the question does not involve an employer's attempt to set union members' dues, but concerns its 8(a)(3) liability and commensurate responsibility not to collect more dues from the wages of its non-member employees than the law allows. Consequently, the Board's reliance upon internal union voting cases such as *NLRB v. Financial Inst. Employees*, 475 U.S. 192 (1986) (affiliation vote does not raise a question concerning representation), *United Steelworkers v. Sadlowski*, 457 U.S. 102 (1982) (LMRDA does not restrict internal union rule against members' receipt of outside contributions to fund campaigns for union office), and *Metal Workers Alliance, Inc.*, 172 N.L.R.B. 815 (1968) (amount of union reinstatement fee set by the union not violative of § 8(b)(5) unless excessive), is misplaced because the cases are distinguishable.[5]

Yet, the question studiously avoided by the Board is what *does* § 8(a)(3) provide. The Board agrees that § 8(a)(3) protects the non-union worker at least in some circumstances. Brief at 8.

With the definitive statutory construction given by this Court in *Beck* to § 8(a)(3) and union collection actions, it is contrary to the statute for the Board to deny the Act's protection to non-members by suggesting that it *might* in the future hold that an employer does not commit an unfair labor practice when it collects 100% of union dues from its non-member workers. Brief at 10. Such a holding, were it to occur, would not immunize employers from employees' claims, as the Board suggests. Employees can bring their claims in federal courts, under *Glover v. St. Louis-San Francisco Ry.*, 393 U.S. 321, 331 (1969) (Harlan,

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[5]In fact, a union's legitimate interest in a non-member is "in the most limited sense." *Pattern Makers of America*, 473 U.S. 95 n.16 (1985). That financial "relationship" is established by the employer and union under § 8(a)(3). It is not created by the union acting unilaterally under the auspices of § 8(a)(3). It is therefore difficult to comprehend any basis in fact or law for the Board's argument that the employer's collection of an agency fee has nothing to do with the employment relationship of its non-union employees.

J.; concurring). In any event, speculating about what the Board may do in the future, which may possibly be sustained by this Court, is the very worst kind of *post hoc* argument.[6]

The Board decided this case *before* this Court's decision in *Beck*, refused to reconsider it in light of *Beck*, and never sought to recall the case from the court of appeals to address *Beck*. In any event, neither the Board nor the court of appeals below held, or even suggested, that employers have *no* liability to employees for complicity in a union's *Beck* violations. Even now, the Board will go no further than to say "the amount of the agency fee concerns *primarily* the relationship between the union and the nonmember employee." Board Brief at 4. It does not, and could not, say that the "amount of an agency fee concerns [*exclusively*] the relationship between the union and the non-member employee," for it is not the membership relation, but the employment relationship that is of concern here.

The Board's position could only be true if § 8(a)(3) did not exist, nonmember fees were never a "condition of employment," and unions collected fees from nonmembers solely in judicial proceedings, with the commensurate protection provided through judicial procedures.

The Board's stated position regarding *General Motors Corp.* and *Beck* is also irrational in view of the Act's policy of voluntary unionism. The Board concocts a distinction between stating the nonmembers' fee in terms of language as opposed to stating that fee as a figure. There is no such distinction.[7]

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[6]This possible future action, as *Kaiser Steel*, *supra* at 5, shows would be contrary to the Board's existing precedent.

[7] *General Motors Corp.* makes requiring nonmembers to pay a "dues-equivalent" amount a mandatory subject of bargaining. Assuming "dues" to be $100.00, there is no reason to believe the nonmember obligation could not be stated as a figure : $100.00, under *General Motors Corp.*, rather than through use of the language "dues-equivalent." *Beck* makes clear that "dues" under § 8(a)(3) is *not* the voluntary dues of a full member, but is a charge for "collective

Finally, the Board's brief, page 11 n.7, erroneously suggests that the *amicus curiae* brief of Karen Leslie Fuller is mere duplication of the arguments made by this Petitioner. Our reading of the *amicus* brief shows that her arguments are not duplicative of the Petition, but that the whole question of nonmembers' fees is presented from the standpoint of the employees who must pay them, not the employers who include that obligation in a collective bargaining agreement. The arguments of the *amicus curiae* cannot be footnoted away, as the Board attempts to do. The Board's failure to address those arguments, never mind refute them, is an admission that it cannot do so. Petitioner commends the *amicus curiae* brief to the Court's reading, especially in view of the Board's demurrer to the arguments made there.

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bargaining, contract administration, and grievance adjustment."

Applying *General Motors Corp.* and *Beck*, then, the nonmembers' obligation could be stated in language, to wit: "a pro rata share of the union's costs of collective bargaining, contract administration, and grievance adjustment." Assuming a voluntary members' dues to be $100.00, and the costs of collective bargaining to be $21.00, there is no reason in *General Motors Corp.* that the *Beck* collective bargaining charge cannot be stated as a figure, $21.00, rather then through use of language. Either both the figure and the language are "mandatory subjects of bargaining" or neither is. *General Motors Corp*, Petitioner believes, has already answered that question.

CONCLUSION

The briefs now before the Court demonstrate that the question of agency fee agreements is a most serious and important issue affecting modern labor relations. Unless this Court grants plenary review now, the question whether an employer is entitled to obtain information necessary to protect itself from liability for violations of section 8(a)(3) and complicity in duty of fair representation cases, will be lost.

WHEREFORE, Petitioner respectfully requests that the Court issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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